

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**GENERVA M. WALKER**

Claimant

VS.

**VIA CHRISTI HEALTH SYSTEM**

Respondent

AND

**LIBERTY MUTUAL INSURANCE COMPANY**

Insurance Carrier

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Docket No. 242,959

**ORDER**

Respondent and its insurance carrier appealed the December 3, 2001 Award entered by Administrative Law Judge Nelsonna Potts Barnes. The Board heard oral argument on July 12, 2002, in Wichita, Kansas.

**APPEARANCES**

Michael L. Snider of Wichita, Kansas, appeared for claimant. Edward D. Heath, Jr., of Wichita, Kansas, appeared for respondent and its insurance carrier.

**RECORD AND STIPULATIONS**

The record considered by the Board and the parties' stipulations are listed in the Award. The Board notes the article attached to claimant's brief to the Board is not part of the evidentiary record as respondent and its insurance carrier did not stipulate to its admission and the document, which is medical hearsay, was not otherwise offered or entered into evidence at any of the hearings or depositions held in this claim.

**ISSUES**

This is a claim for injuries sustained by claimant while working for respondent and being exposed to toxic mold spores. Claimant alleges a period of accident from August 1996 through October 18, 1997, and also alleges that the exposure has caused frontal lobe brain damage resulting in memory and concentration problems. The parties stipulated that

October 18, 1997, would be the appropriate date of accident for this alleged series of accidental injury.

In the December 3, 2001 Award, Judge Barnes determined claimant sustained brain damage due to the exposure and awarded claimant a 55 percent permanent partial general disability, which was based upon a 47 percent wage loss and a 63.4 percent task loss.

Respondent and its insurance carrier contend Judge Barnes erred. At oral argument before the Board, they argued the evidence fails to prove that the exposure to the mold caused the alleged memory and concentration problems that claimant now experiences. They also questioned whether claimant has sustained an accidental injury or suffers from an occupational disease. Accordingly, respondent and its insurance carrier request the Board to reverse the Award and deny claimant's request for benefits.

On the other hand, claimant contends the Award should be affirmed.

As respondent and its insurance carrier concede that claimant was exposed to toxic mold spores, the only issues before the Board on this appeal are:

1. Was claimant's alleged disability caused by an accidental injury or an occupational disease?
2. Did the exposure to the mold cause claimant's memory and concentration deficits?
3. If so, what is the nature and extent of claimant's disability?

#### **FINDINGS OF FACT**

After reviewing the entire record, the Board finds:

This is a claim for a disability that allegedly resulted from the exposure to mold spores in the medical clinic where claimant worked. Claimant contends the exposure to the mold spores constitutes an accidental injury under the Workers Compensation Act and that she should receive workers compensation benefits for that accident.

Respondent employed claimant as a licensed practical nurse in a clinic in Mulvane, Kansas. Claimant worked at that facility from approximately September 1995 through approximately October 18, 1997, when the clinic was closed to eradicate toxic mold and fungi that was found growing on the walls of the building.

Claimant first began noticing problems with her memory in 1996 when she began forgetting where supplies were located. In 1997, claimant began to experience dizzy spells and began experiencing daily headaches. During that period, claimant's job performance

also began to suffer. After receiving good job performance evaluations in July 1996 and April 1997, in June 1997 respondent warned claimant that her job performance was unsatisfactory.

Before the Mulvane clinic was closed in October 1997, others also had begun experiencing headaches and asthma symptoms. Respondent temporarily moved the clinic operations to Derby, Kansas, where claimant worked until the Mulvane facility reopened in approximately late March 1998. Approximately two weeks after claimant returned to the Mulvane facility, respondent terminated claimant for poor job performance.

Four experts testified as to claimant's injuries. Claimant presented the testimony of Dr. P. Brent Koprivica, who is board-certified in emergency medicine and occupational medicine. Dr. Koprivica evaluated claimant in June 2000 and found claimant had sustained damage to her forebrain due to a neuropsychologic toxicity. The doctor determined claimant had a 29 percent whole person functional impairment and reasoned that claimant should not work in the health care field due to her memory and judgment problems.

Claimant also presented the testimony of Samuel N. Harrell, Ph.D., a clinical and forensic psychologist who evaluated claimant in October 2000 at the request of one of claimant's attorneys. Dr. Harrell performed neuropsychological testing and agreed with Dr. Koprivica that claimant had sustained brain damage as a result of the exposure to the mold spores at work. According to Dr. Harrell, claimant has memory deficits that are neurological rather than psychological in nature. He arrives at that opinion on the basis of the tests that he administered and because he found no difference in stress and non-stress performances. Additionally, the doctor believes claimant experienced an abrupt change in her ability to function, which is indicative of a traumatic event. Dr. Harrell rated claimant's whole body functional impairment at 69 percent and he also believes claimant should not work as a nurse with her deficits.

On the other hand, respondent and its insurance carrier presented the testimony of Mitchel A. Woltersdorf, Ph.D., who holds himself out as a neuropsychologist and who evaluated claimant in July 2001. Dr. Woltersdorf disagrees with the results of Dr. Harrell's evaluation and testified that Dr. Harrell's testing was only partial and would not be construed as a neuropsychological battery and, in at least one instance, Dr. Harrell erred in grading the results of his tests. According to Dr. Woltersdorf's evaluation, claimant's memory and concentration problems are not the result of organic brain damage but, instead, they are psychological and emotional in nature. In arriving at that conclusion, the doctor relied upon the results of his tests and noted that claimant's test results fluctuated throughout the day, which indicated an emotional problem rather than organic brain damage. Dr. Woltersdorf rates claimant as having a 10 percent whole body functional impairment due to the exposure to the toxic mold and, contrary to both Dr. Koprivica and

Dr. Harrell, believes claimant's "not working as a practical nurse is a choice not supported by cognitive data."

Respondent and its insurance carrier also presented the testimony of Dr. Larry K. Wilkinson, who initially evaluated claimant's medical records for a defendant in a related civil suit. Dr. Wilkinson is board-certified in family medicine and board-eligible in occupational medicine. According to the doctor, there were no reliable studies to suggest that the toxic mold in respondent's clinic would cause frontal lobe dysfunction and there were no studies to indicate claimant had frontal lobe dysfunction. In his opinion, claimant's memory deficits were not caused by a mold exposure at respondent's medical clinic. The Board notes, however, that Dr. Wilkinson did not personally examine claimant and that approximately 60 percent of his income is derived from contracts with respondent or its related entities.

### **CONCLUSIONS OF LAW**

The Award should be reversed.

The Board concludes the evidence fails to establish that it is more probably true than not that claimant's disability resulted from an accident rather than from a disease. Further, the evidence fails to establish that exposure to mold spores was a peculiar hazard or special risk of being a nurse as distinguished from other occupations. The mold in the clinic building is not associated in any way with the work activities conducted in that building. Moreover, there is no evidence that would indicate there is greater risk of exposure to mold spores in a medical clinic than in any other structure. Accordingly, claimant's disability from the mold exposure is not compensable under the Workers Compensation Act as either an accidental injury or as an occupational disease.

The Workers Compensation Act provides for the payment of benefits when a worker sustains personal injury by accident arising out of and in the course of employment<sup>1</sup> or when a worker develops an occupational disease.<sup>2</sup>

The Act defines "accident," as follows:

"Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner

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<sup>1</sup> K.S.A. 1997 Supp. 44-501(a).

<sup>2</sup> K.S.A. 44-5a01 (Furse 1993).

designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment.<sup>3</sup>

On the other hand, the Act defines “occupational disease,” as follows:

“Occupational disease” shall mean only a disease arising out of and in the course of the employment resulting from the nature of the employment in which the employee was engaged under such employer, and which was actually contracted while so engaged. “Nature of the employment” shall mean, for purposes of this section, that to the occupation, trade or employment in which the employee was engaged, **there is attached a particular and peculiar hazard of such disease which distinguishes the employment from other occupations and employments, and which creates a hazard of such disease which is in excess of the hazard of such disease in general.** The disease must appear to have had its origin in a special risk of such disease connected with the particular type of employment and to have resulted from that source as a reasonable consequence of the risk. Ordinary diseases of life and **conditions to which the general public is or may be exposed to outside of the particular employment, and hazards of diseases and conditions attending employment in general, shall not be compensable as occupational diseases . . .**<sup>4</sup> (Emphasis added.)

There are few cases in which the appellate courts have addressed whether exposure to a potentially toxic substance should be treated as an accident or as a disease. The Board is unaware of any Kansas case in which an appellate court states what factors should be considered in determining whether an exposure to a toxic agent over a period of time should be treated as an accident or an occupational disease. But in one case, however, the Kansas Supreme Court indicated a distinguishing factor was whether the injury was traumatic in origin. In *Watson*,<sup>5</sup> the Court dealt with the aggravation of an asthmatic condition from breathing wheat dust, and stated:

The gist of the claimant’s argument is that he sustained personal injury by accident, or a series of accidents, arising out of and in the course of employment, *i.e.*, by a series of traumas between October 7, 1959, and January 31, 1960, which aggravated a pre-existing asthmatic condition, and that this case falls within the rule of *Winkelman v. Boeing Airplane Co.*, *supra*. In the instant case the record neither discloses such evidence nor did the trial court make a finding of such fact. In the *Winkelman* case there was evidence that the injury was traumatic in origin while in

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<sup>3</sup> K.S.A. 1997 Supp. 44-508(d).

<sup>4</sup> K.S.A. 44-5a01(b) (Furse 1993).

<sup>5</sup> *Watson v. International Milling Co.*, 190 Kan. 98, 372 P.2d 287 (1962).

the instant case there is no such evidence or finding. Whereas we approve the rule in the *Winkelman* case, in view of the findings of the trial court it is not applicable here. We are of the opinion that this case is controlled by what has been said in *Echord v. Rush*, supra, and *Vocke v. Eagle-Picher Co.*, 168 Kan. 708, 215 P. 2d 185.<sup>6</sup>

The Supreme Court in *Watson* also noted that the worker's inhalation of wheat dust in the mill where he worked was not due to an undesigned, sudden or unexpected event but, instead, to years of exposure to the dust in the mill. Implicitly, in addition to considering whether an injury is traumatic in origin, a second factor to be considered in determining whether a worker has sustained an accident or suffers from a disease is the duration of the exposure.

In *Vocke*,<sup>7</sup> the Kansas Supreme Court affirmed the trial court's decision that the worker's disability resulted from an occupational disease and not from an accident within the meaning of the Workers Compensation Act. Although there was evidence the worker was exposed to a greater concentration of lead dust over a certain three-day period, the Court also said there was "evidence to support the view claimant's disability was the result of daily lead poisoning over the entire three-year period of his employment including the three days he worked in the trails." In its analysis of the evidence, the Supreme Court looked at the period of exposure to the lead, considered testimony regarding traumatic injury, and considered testimony that lead poisoning is only caused by absorption.

The Board concludes in the instant case that claimant's disability was not caused by an injury that was traumatic in origin. The Board further concludes that claimant's exposure to the mold spores was over a period of several months. Accordingly, the facts do not establish that claimant sustained personal injury by accident arising out of and in the course of employment.

Finally, the Board concludes that claimant's occupation as a nurse neither increased the likelihood nor placed her at a greater or peculiar risk of being exposed to mold spores than any other occupation. Accordingly, claimant has not established that her disability is the result of an occupational disease.

Claimant's request for benefits should be denied.

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<sup>6</sup> *Watson*, at 100.

<sup>7</sup> *Vocke v. Eagle-Picher Co.*, 168 Kan. 708, 215 P.2d 185 (1950).

**AWARD**

**WHEREFORE**, the Board reverses the December 3, 2001 Award and denies claimant's request for benefits.

The Board adopts the orders set forth in the Award regarding the payment of the administrative costs.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of August 2002.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Michael L. Snider, Attorney for Claimant  
Edward D. Heath, Jr., Attorney for Respondent and its Insurance Carrier  
Nelsonna Potts Barnes, Administrative Law Judge  
Director, Division of Workers Compensation